Tentative Rulings for May 18, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG02408 ***Rattan v. Singh et al.*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

03

Tentative Ruling

Re: ***O'Connell v. Community Medical Centers, Inc.***
Case No. 16 CE CG 00542

Hearing Date: May 18th, 2016 (Dept. 403)

Motion: Defendant's Motion to Compel Arbitration and Stay Proceedings

Tentative Ruling:

To grant defendant CMC's motion to compel plaintiff to attend arbitration and stay the proceedings until the arbitration has been resolved. (Code Civ. Proc. §§ 1281.2; 1281.4.)

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED ON THURSDAY, MAY 19, 2016 AT 3:00 PM.

Explanation:

The party moving to compel arbitration must establish the existence of a written arbitration agreement between the parties. This is usually done by presenting a copy of the signed, written agreement to the court. "A petition to compel arbitration or to stay proceedings pursuant to Code of Civil Procedure sections 1281.2 and 1281.4 must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference." (Cal. Rules of Court, Rule 3.1330.) Also, the party moving to compel arbitration must establish that it demanded arbitration from the other party, and that the other party refused to agree to arbitration. (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641.)

In ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute, and general principles of California contract law guide the court in making this determination. (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534.) A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract. (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515.) Arbitration is a matter of contract and a party cannot be required to arbitrate a dispute he has not agreed to submit. (*Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, review denied.)

Here, defendant contends that plaintiff electronically signed the Dispute Resolution Agreement (DRA), which expressly provides for arbitration of the type of claims raised by plaintiff here, including claims for discrimination, harassment, retaliation, and wrongful termination. (Exhibit A to Milton decl.) However, plaintiff claims that she never signed the DRA, and that she does not recall ever receiving or seeing a copy of it. (O'Connell decl., ¶ 3.) Plaintiff contends that, since she denies ever seeing, receiving or signing the DRA, and defendant has no signed copy of the agreement, defendant has not met its burden of showing that an agreement to arbitrate the dispute exists, and therefore she cannot be compelled to attend arbitration based on its terms.

In *Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, the Fourth District Court of Appeal addressed the issue of whether an employee who allegedly electronically signed an agreement to arbitrate disputes arising out of his employment could be compelled to arbitrate his claims. The Court of Appeal affirmed the trial court's decision that the employer had not met its burden of showing that a valid arbitration agreement existed because there was no evidence that the employee was the person who had executed the agreement electronically. (*Id*. at 842-843.) The court concluded that defendant had presented insufficient evidence to authenticate the alleged electronic signature of the employee. (*Id*. at 843.) The court found that the conclusory assertion by the defendant's employee that the plaintiff was the person who electronically signed the agreement was not sufficient to show that he was the person who actually signed the agreement, since there was no evidence to explain how she arrived at that conclusion. (*Id*. at 843 - 844.) "Main never explained how Ruiz's printed electronic signature, or the date and time printed next to the signature, came to be placed on the 2011 agreement. More specifically, Main did not explain how she ascertained that the electronic signature on the 2011 agreement was 'the act of' Ruiz." (*Ibid*.) "This left a critical gap in the evidence supporting the petition." (*Id*. at 844.)

In the present case, plaintiff contends that defendant has also failed to meet its burden of showing that she was the person who actually electronically signed the DRA, for the same reasons cited by the court in *Ruiz*. However, the defendant here has presented evidence that fills in the evidentiary gaps cited in Ruiz, and authenticates that plaintiff was the person who signed the DRA.

According to Carla Milton, defendant's Director of Organizational Development and Education, CMC uses a computer based learning management system called Healthstream Learning Center (HLC) to communicate with employees regarding CMC's policies, and to provide training to employees. (Milton decl., ¶ 2.) Employees access the HLC program on a computer using their unique username and password. (*Id*. at ¶ 3.) Employees were required to review an updated Dispute Resolution Agreement in April of 2015. (*Id*. at ¶ 4.) After viewing the DRA, employees were required to electronically confirm receipt of the DRA. (*Id*. at ¶ 7.) The confirmation screen appears in HLC only after the employee reviews all pages of the DRA. (*Ibid*.)

Employees were also asked to acknowledge receipt of the DRA and agree to abide by its terms. (*Id*. at ¶ 8.)

Employees affirmatively expressed their acceptance of the terms of the DRA by clicking the 'I confirm the above statement' button in the HLC module." (*Id*. at ¶ 9.) The page also states that, "I understand that by clicking the 'I confirm the above statement' button, I have received and am agreeing to the Dispute Resolution Agreement (which includes my ability to opt-out of the agreement within the period of time noted in the Dispute Resolution Agreement). I also agree that this electronic communication satisfies any legal requirement that such communication be in writing, and that my electronic signature below is as legally binding as an ink signature." (*Id*. at ¶ 10, italics omitted.)

After an employee clicks the "I confirm the above statement" button to confirm receipt and acceptance of the DRA, an electronic record is created indicating that the employee has "completed" this module in the HLC. (*Id*. at ¶ 14.) The electronic record will not show this module as having been completed unless the employee has reviewed the policies and clicked the "I confirm the above statement" button to confirm receipt and acceptance of the HLC. (*Ibid*.)

Also, after the employee clicks the "I confirm the above statement" button, a Certificate of Completion is created, which states that "This is to certify that [employee's name] has signed the Dispute Resolution Agreement ('DRA') by receiving a copy of the DRA and clicking the 'I confirm the above statement' button to electronically sign the DRA." (*Id*. at ¶ 15.) The Certificate of Completion includes the employee's name and the date that the employee clicked the "I confirm the above statement" button to confirm receipt and acceptance of the DRA. (*Ibid*.) Furthermore, CMC has no record that plaintiff ever opted out of the DRA. (*Id*. at ¶ 17.)

In addition, defendant has presented the declaration of Esther Castaneda-Wilson, defendant's Manager of Education Services, who is responsible for creating and uploading content in the HLC system, and who has access to the records of CMC employees regarding the modules they have completed in HLC. (Castaneda-Wilson decl., ¶¶ 1-6.) Castaneda-Wilson retrieved the transcript report associated with plaintiff, who was known as Susan Oaxaca-Roberts when she worked for CMC. (*Id*. at ¶ 13.) The transcript report indicates that plaintiff completed the DRA module on June 9th, 2015. (*Id*. at ¶ 14.) Castaneda-Wilson was also able to retrieve the Certificate of Completion associated with plaintiff's review and acceptance of the DRA. (*Id*. at ¶ 15, see also Exhibit C to Castaneda-Wilson decl.) Therefore, Castaneda-Wilson concludes that, based on the transcript report and the Certificate of Completion, plaintiff reviewed the DRA and agreed to abide by its terms on June 9th, 2015. (*Id*. at ¶¶ 16, 17.)

The evidence cited above is far more detailed than the conclusory assertions of the defendant in *Ruiz*. There is sufficient evidence to meet defendant's burden of showing that only plaintiff could have electronically

signed the DRA, since the plaintiff would have to use her unique username and password to access the system, and the Certificate of Completion would only be generated once she clicked the button to confirm that she had agreed to the DRA's terms. Also, there is no evidence that plaintiff ever opted out of the DRA by submitting a written request to opt out to defendant's management. Thus, unlike in *Ruiz*, here defendant has submitted adequate evidence to show that plaintiff electronically signed the DRA and agreed to its terms.

While plaintiff denies ever "signing" the DRA, the defendant has presented evidence that the plaintiff electronically signed the DRA by clicking on the "I confirm the above statement" button in the computer module, which was the equivalent of an ink signature. Thus, plaintiff's denial that she signed the agreement does not necessarily establish that she did not consent to the agreement. Also, while plaintiff claims that she does not "recall" reviewing the DRA or answering the questions in the HLC module, she does not actually deny that she did review the module and click the button to confirm that she read and agreed to the DRA. Plaintiff's statement that she does not recall reviewing or agreeing to the DRA is evasive at best, and does not suffice to rebut defendant's showing that she agreed to the DRA electronically.

Plaintiff argues in opposition that the statements of Castaneda-Wilson and Milton are nothing more than inadmissible hearsay, and thus they cannot be used to show that plaintiff actually signed the agreement. However, the statements of defendant's declarants fall into the business records exception to the hearsay rule, and therefore they are admissible. (Evidence Code § 1271.) Therefore, the court intends to overrule plaintiff's hearsay objection and find that there was a valid agreement to arbitrate the dispute.

Plaintiff has also argued that the fact that there is an opt-out provision in the DRA does not mean that it is not procedurally unconscionable. Plaintiff cites to *Gentry v. Superior Court* (2007) 42 Cal.4th 443, overruled on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, in support of her position. It is true that *Gentry* held that, just because there is an opt-out provision in an arbitration clause, this does not automatically mean that the agreement is not a contract of adhesion, because there may be other factors indicating that the employee's failure to opt out of the agreement was not an authentic informed choice. (*Id*. at 470.)

Here, the DRA does not contain the same type of biased explanation of the benefits of arbitration that was present in the *Gentry* case. The agreement provides that the arbitrator may award any remedy that would have been available to a party under applicable law, limited only to those remedies that would be available in a party's individual capacity in a court. (Exhibit A to Milton decl., DRA, p. 2, ¶ 6.) The parties are required to pay their own attorney's fees, "subject to any fee shifting remedies under applicable law." (*Ibid*.) CMC is also required to pay the arbitrator's fees. (*Ibid*.) There is nothing that restricts the statute of limitations for any claims, limits plaintiff's damages, or deprives plaintiff of her right to recover her attorney's fees, if such a right is available under the

law. Therefore, the factors that weighed in favor of procedural unconscionability in *Gentry* are not present here, other than the fact that the employer may favor using arbitration as opposed to litigating in court.

However, even assuming that there is an element of procedural unconscionability present in the DRA based on the fact that it was presented by the employer to the employee and there may have been some pressure to sign the agreement rather than opt out, the plaintiff must also show that the agreement is substantively unconscionable in order to prevent the court from enforcing the agreement based on unconscionability.

"'[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results. 'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, at 114, citations omitted.)

Here, plaintiff has made no real effort to show that the DRA is substantively unconscionable. As discussed above, the agreement provides for the same types of remedies that the plaintiff could obtain if she sued in civil court, including attorney's fees if such fees are permitted under the law. (DRA, p. 2, ¶ 6.) The parties have the right to conduct "adequate discovery", bring motions, and present necessary witnesses and evidence, with any disputes about these matters being resolved by the arbitrator. (*Ibid*.) The agreement also provides for the selection of a neutral arbitration by the agreement of both parties, or by the court if the parties are unable to agree. (*Id*. at pp. 1, 2, ¶ 5.) The arbitrator must provide a written statement of decision with factual findings and legal conclusions. (*Id*. at p. 2, ¶ 6.) The defendant is required to pay the arbitrator's fees, so the plaintiff will not be overly burdened with greater costs than she would have incurred if she went to court to litigate her claims.

Thus, there is no evidence that the agreement is overly harsh or one-sided in favor of the employer over the rights of the employee. As a result, the court intends to reject plaintiff's claim of unconscionability and enforce the agreement to arbitrate. The agreement clearly covers the type of claims that plaintiff raises in her complaint, including claims for discrimination, retaliation, and wrongful termination. (DRA, p. 1, ¶ 2.) However, plaintiff has refused to agree to submit her case to arbitration, despite the demand of defendant. Consequently, the court intends to require the parties to resolve their claims

through arbitration, and to stay the present proceedings until the arbitration has been concluded.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/17/16 .
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Alex Bejarano v. International Paper Company, et al.***
Superior Court Case No. 13CECG03011

Hearing Date: May 18, 2016 (Dept. 403)

Motions: Vacate notice of settlement; specially set trial date

Tentative Ruling:

To deny the motion to vacate the notice of settlement filed by Plaintiff September 21, 2015 (Cal. Rules of Court, rule 3.1385(b)), rendering the motion to specially set a trial date moot.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED ON THURSDAY, MAY 19, 2016 AT 3:00 PM.

Explanation:

"The only decision before the court at a rule 3.1385 hearing is whether to dismiss the case or restore it to the civil active list." (*Irvine v. Regents of University of California* (2007) 149 Cal.App.4th 994, 1001.) California Rules of Court, Rule 3.1385, requires a plaintiff to notify the court immediately upon settlement of the case. (Cal. Rules of Court, rule 3.1385(a)(1).) Where a settlement is conditional, the party giving notice must specify the date by which a dismissal is to be filed. (Cal. Rules of Court, rule 3.1385(c).) If the party required to file a request for dismissal fails to do so within 45 days after the dismissal date in the notice, the court must dismiss the entire case unless good cause is shown why the case should not be dismissed. (Rule 3.1385(b), (c)(2).)

In the instant case, the notice of settlement filed by Plaintiff September 21, 2015, clearly states:

> "You must file a dismissal of the entire case within 45 days after the date specified in item 1b below if the settlement is conditional. Unless you file a dismissal within the required time or have shown good cause before the time for dismissal has expired why the case should not be dismissed, the court will dismiss the entire case." (Not. of settlement, p. 1.)

Plaintiff failed to dismiss the case by December 15, 2015, or show good cause as to why the case should not be dismissed. Accordingly, the motion to vacate the notice of settlement is denied.

In light of the Court's ruling on the motion to vacate, Plaintiff's motion to specially set a trial date is moot.

Request for judicial notice

Judicial notice is taken as requested by Defendant.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/17/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Seibert et al. v. Laughton et al.***
Superior Court Case No. 12 CECG 00881

Hearing Date: May 18, 2016 **(Dept. 403)**

Motion: By Defendants Paul Laughton and Larry Cheng seeking attorney's fees

Tentative Ruling:

To deny the motion brought by Defendant Laughton on the grounds that he did not prevail at trial on any cause of action for breach of contract. The gravamen of the causes of action remaining for trial against him sounded in fraud and negligence.

To deny the motion brought by Defendant Cheng without prejudice on the grounds that his motion is intertwined with the fees incurred in the defense of Mr. Laughton.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED ON THURSDAY, MAY 19, 2016 AT 3:00 PM.

Explanation:

Background

Defendant Laughton was an investment broker with the Fresno Branch of the Royal Bank of Canada (RBC). He had previously been employed with Wells Fargo and then Sutro. The latter was taken over by RBC. The Plaintiff, Karyn Seibert had been Laughton's client beginning at Wells Fargo, then Sutro and then RBC. He left RBC in 2007. At some point in time, he advised the Plaintiff to invest in some real estate ventures in which he was investing. RBC claimed that it had nothing to do with these ventures because it deals only in stocks and securities, not real estate. Laughton claimed that he told the Plaintiff that this was an investment opportunity that he was independently pursuing. When the Plaintiff lost millions of dollars in these investments, she filed suit against Laughton, RBC, the investment LLCs and her co-investors.

Motion by Defendant Laughton

Defendant Laughton prevailed at trial against Plaintiff on all remaining causes of action; i.e., breach of fiduciary duty, fraud, negligent misrepresentation, negligence and intentional interference with prospective economic advantage, and negligent interference with prospective economic

relations. See Statement of Decision as to Defendant Laughton filed on December 18, 2015. On March 3, 2016, Defendant filed a motion seeking attorney's fees on the grounds that he prevailed on the contracts consisting of the operating agreements for each of the investment opportunities in which the Plaintiff lost money. See Defendant's Memorandum of Points and Authorities at pages 3 and 4.

Attorney's fees may be awarded under Civil Code §1717 in an action:

• For rescission of the contract. See *Neptune Soc'y Corp. v Longanecker* (1987) 194 Cal.App.3d 1233, 1249-1250.
• For reformation of the contract. See *Wong v Davidian* (1988)206 Cal.App.3d 264, 270-271.
• For specific performance of the contract. See *Hsu v Abbara* (1995) 9 Cal.4th 863, 876-877; *Behniwal v Mix* (2007) 147 Cal.App.4th 621, 634-637; *Baugh v Garl* (2006) 137 Cal.App.4th 737, 742-743.
• For declaratory relief in which a party requests the court to determine the parties' rights and duties under the contract. See *Silver Creek, LLC v Blackrock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1538; *Exxess Electronixx v Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 707; *City & County of San Francisco v Union Pac. R.R. Co.* (1996) 50 Cal.App.4th 987, 999-1000.

Whether an action is based on a contract or tort depends on the nature of the right sued on, not the form of the pleadings or the relief demanded. An action is contractual if it is based on a breach of promise; an action is tortious if it is based on breach of a noncontractual duty. *Amtower v Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1602. For example, a client's malpractice action against its attorney is not an "action on a contract" based on the parties' retainer agreement, but is a tort action for professional negligence. [*Loube v Loube* (1998) 64 Cal.App.4th 421, 429-430.] Asserting a contractual defense, *e.g.*, execution of a written release, to a tort action for fraud does not make the action an "action brought to enforce the contract." *Gil v Mansano* (2004) 121 Cal.App.4th 739, 744-745. An action for fraud is a tort action and is not "on a contract" for purposes of Civil Code §1717, even when the underlying transaction in which the fraud occurred involved a contract containing an attorney's fees clause. [*Cussler v. Crusader Entertainment*, LLC (2012) 12 Cal.App.4th 356 at 366.]

When identifying the legal basis of the prevailing party's recovery, the court may consider the pleaded theories of recovery, the theories asserted, the evidence produced at trial, and any additional evidence submitted on the motion to recover fees. [*Hyduke's Valley Motors v Lobel Fin. Corp. (2010)* 189 Cal.App.4th 430 at 435.] The mere fact that the complaint pleads a breach of contract cause of action is not dispositive. Id. at 436.

In the action at bench, Defendant Laughton did not prevail at trial on any cause of action for breach of contract. See Statement of Decision as to Defendant Laughton at page 3 lines 16-21. See also Plaintiff's opposition filed on

April 12, 2016 at page 2 lines 6-12. Notably, a general demurrer to the sixth cause of action alleging breach of contract was sustained without leave to amend. See Minute Order filed on February 26, 2015. In addition, Plaintiff's action sounded in fraudulent inducement to enter into a contract; i.e., the investment agreements. But, fraudulent inducement to enter into a contract is not an action on the contract and does not bring Civil Code § 1717 into operation. [*Schlocker v. Schlocker* (1976) 62 Cal.App.3d 921.] Therefore, the motion will be denied.

Motion by Defendant Cheng

The Court noted in its statement of decision that Mr. Cheng was entitled to attorney's fees given that the action brought by the Plaintiff against him was "on the contract"; i.e., the Operating Agreement for the AGLD and it contained an attorney's fees provision. See Statement of Decision as to Defendant Cheng filed on December 18, 2015 at page 3 lines 14-16. However, the motion filed on March 3, 2016 intertwines the fees incurred by Defendant Cheng with those incurred by Defendant Laughton. Therefore, the motion will be denied without prejudice to re-filing the motion and evidence in support of fees incurred only by Mr. Cheng in defense of the action at bench.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/17/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(29)

Tentative Ruling

Re: ***Acclaim Credit Technologies v. Big Valley Farm and Management, Inc.***
Superior Court Case No. 15CECG03404

Hearing Date: May 18, 2016 (Dept. 501)

Motion: Plaintiff's motion for leave to file amended complaint

Tentative Ruling:

To deny without prejudice. (Cal. Rules of Court, rule 3.1324(a), (b), (c).)

If oral argument is requested it will be held on May 19, 2016, at 3:30 p.m. in Department 501.

Explanation:

The requirements of California Rules of Court, rule 3.1324, have not been met. Accordingly, Defendant's motion is denied without prejudice.

The Court notes that Plaintiff requests leave to file a Second Amended Complaint, however no First Amended Complaint was found in the Court's file.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/16/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Lanier v. San Joaquin Valley Officials Association et al.***, Superior Court Case No. 13CECG02843

Hearing Date: **May 18, 2016 (Dept. 501)**

Motion: Demurrer to Second Amended Complaint

Tentative Ruling:

To take the demurrer off calendar due to failure to comply with Code of Civil Procedure section 430.41. The parties are ordered to meet and confer pursuant to the statute and, if necessary, to calendar a new hearing date for a demurrer.

If oral argument is requested it will be held on May 19, 2016, at 3:30 p.m. in Department 501.

Explanation:

Code of Civil Procedure section 430.41 provides:

> (a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer.

There is no indication of any meet and confer. Nor did counsel file the declaration required by subdivision (a)(3), stating the means by which the parties met and conferred, and that they failed to reach an agreement resolving the objections raised in the demurrer. For that reason the demurrer should come off calendar.

The court also notes a couple deficiencies, aside from the failure to meet and confer, that defendants should address in any future demurrers. First, defendants filed a notice of motion and memorandum of points and authorities, but no separate demurrer. A demurrer should be captioned as such, and must distinctly specify the grounds for demurrer. (Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2015) ¶¶ 7:99, 7:100.) Second, the memorandum does not actually discuss any of the allegations of the pleading at issue. Defendants merely recite general principles relevant to each cause of action, and state what is missing in a conclusory fashion. The court expects a fuller discussion and analysis of the allegations of the complaint.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 5/16/16 .

(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(19) **Tentative Ruling**

Re: ***Orange Cove Full Gospel Temple v. Leeper***
Court Case No. 14CECG03480

Hearing Date: May 18, 2016 (Department 502)

Motion: By defendants to continue trial

By defendants to compel attendance at deposition and production of documents thereat by Veronica Garcia, Gilbert Garcia, and Claude Greenwood.

Tentative Ruling:

To take motion to continue trial off-calendar.

To order that the discovery and motion cutoff dates run from the current trial date, and to grant the motion to compel depositions. The depositions are to take place on or before June 1, 2016.

Explanation:

1. Motion to Continue Trial

No moving papers were filed. The motion is therefore taken off calendar.

2. Motion to Compel Depositions

No one disputes defendants' avowed need for the depositions sought; Mr. Greenwood verified a prior pleading for plaintiffs.

The Court's order of November 17, 2016 is silent on the issue of the discovery and motion cut-off dates. However, the Court's order on the motion by plaintiffs for leave to file an amended complaint notes that "by adding a cause of action which involves an additional party, the plaintiff has added to the complexity of the case."

The Court's file reveals that defendants deferred the depositions at issue so that plaintiffs could take a deposition of a defendant first, for a mediation, and then until the motion to amend was decided, so as to avoid having to seek a second deposition of the same persons. The Court's file also shows that plaintiffs have long been aware that defendants desired to take these depositions, and that plaintiffs have refused them for many months on the basis that the original trial date (changed due to plaintiff's desire to amend) served to cut off discovery. The delay since that time has been due to plaintiffs' refusal.

Defendants' desire to take but one deposition of each person was a reasonable basis for waiting. Plaintiffs have shown no prejudice, as they have known of the desire to take such depositions long before they sought an amendment to their pleadings.

Under these circumstances, the showing under Code of Civil Procedure section 2024.050 has been made. The discovery and motion cutoff dates are to run from the current date for trial. The Court grants the motion to compel the depositions, but makes no ruling on the documents sought thereat. Should there be issues with such documents, a motion may be brought when and if that issue arises.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 5/11/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re:	***Singh v. Rabinda Kindu, M.D. et al.*** Superior Court Case No. 14 CECG 03069
Hearing Date:	May 18, 2016 **(Dept. 503)**
Motion:	Summary Judgment by Defendants Drs. Kundu and Singh

Tentative Ruling:

To overrule the Defendants' objections to the Declaration of Dr. DeMicco. See infra. To deny the motion. Plaintiff has met his burden pursuant to CCP § 437c(p)(2). A triable issue of material fact exists as to whether the standard of care was breached by Drs. Kundu and Singh and whether that breach caused the Plaintiff's injuries.

Explanation:

Ruling on Objections

Expert witnesses may give testimony in the form of an opinion if:

- the witness is *qualified* to testify as an expert;
- the expert witness' testimony is related to a subject matter that is *sufficiently beyond common experience;*
- the expert's opinion would *assist the trier of fact;*
- the expert witness' testimony is *based on matters perceived by or made known to the expert* (either before or at the hearing);
- the expert witness' testimony is *based on matters reasonably relied upon* by experts in forming such opinions. [Evidence Code § 801]

Expert opinion testimony (if otherwise admissible) may embrace the ultimate issue to be decided by the jury. [Evidence Code § 805; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702] The *admissibility* of expert opinion is determined by the court as a matter of law. But the weight to be given expert opinion testimony is normally determined by the trier of fact (jury). A jury is generally *not* bound to accept an expert's opinions and may reject them if, in their judgment, the expert's reasoning is unsound. [See *Kastner v. Los Angeles Metropolitan Transit Auth.* (1965) 63 Cal.2d 52, 58; *Daum v. SpineCare Med. Group, Inc.* (1997) 52 Cal.App.4th 1285, 1304--improper to

instruct jury to consider *only* testimony by medical experts to determine scope of physician's duty to disclose risks in informed consent action]

An expert witness may state on direct examination both the reasons for his or her opinion and the *matters on which it is based*. [Ev.C. § 802; *People v. Catlin* (2001) 26 C4th 81, 137] The opinion may be based on matters "perceived by … the witness … before the hearing, *whether or not admissible*" if of a type that experts reasonably rely upon in forming such opinions. [Evidence Code § 801(b); *People v. Catlin*, supra, 26 Cal.4th at 137; *People v. Dean* (2009) 174 Cal.App.4th 186, 193]

Here, Dr. DeMicco was aware from his inspection of the records that Dr. Singh was a fellow (student) and that he performed the ERCP. Although his Declaration is not a model of clarity, Dr. DeMicco's opinion that Dr. Singh was inexperienced and that inexperience probably caused the perforation is admissible. See Evidence Code §§ 801, 802 and 805. See also *Hanson v. Grode* (1999) 76 Cal.App.4th 601—Plaintiff's declarations in opposition to the motion are to be construed liberally.

As for the contention that Dr. DeMicco did not testify as to causation, this is incorrect. He states that: "Dr. Singh attempted the procedure doing a precut of the bile duct and attempted wire intervention. Perforations, according to the American College (of Gastrointestinal Endoscopy), occur more commonly in ERCPs when a precut is done or wire is manipulated to try and get into the bile duct." See Declaration of DeMicco at ¶ 10. It was the perforation that forms the gravamen of the cause of action for medical negligence. See First Amended Complaint at ¶¶ 20-22.

Merits

The appropriate standard of care required of a medical professional is not a matter of common lay knowledge. Therefore, except in cases of "egregious" medical negligence, expert *medical* testimony is required in medical malpractice actions to establish the standard of care required of a physician (or other health care provider) under the circumstances. [See *Flowers v. Torrance Mem. Hosp. Med. Ctr.* (1994) 8 Cal.4th 992, 1001—single standard of care applied in medical malpractice cases regardless whether negligence is characterized as "ordinary" or "professional"; *Selden v. Dinner* (1993) 17 Cal.App.4th 166, 174—whether emotionally upset surgeon justified in postponing patient's elective surgery requires expert testimony; *Alef v. Alta Bates Hosp.* (1992) 5 Cal.App.4th 208, 215—physicians and nurses subject to separate standards of care; *Osborn v. Irwin Mem. Blood Bank* (1992) 5 Cal.App.4th 234, 271–273—blood bank supplying contaminated blood held to professional standard of care, requiring expert testimony; also see CACI 501, 502, 504]

When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell **within** the community standard of care, he is **entitled** to summary judgment unless the plaintiff comes forward with

conflicting **expert** evidence. See *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.

Here, the Defendants have met their burden of proof through the submission of the Declaration of Kapil Gupta, M.D. Dr. Gupta is a medical doctor licensed to practice in California. He has been board-certified in gastroenterology since 2006 and is currently employed as an interventional gastroenterologist at Cedars-Sinai Medical Center in Los Angeles, CA. See ¶ 1. He opines that both Drs. Kundu and Singh met the standard of care and that no negligent act or omission of these doctors caused or contributed to the injuries suffered by the Plaintiff. See Declaration of Gupta at ¶¶ 10-15.

In opposition, the Plaintiff has met his burden of proof. He submits the Declaration of Dr. Michael DeMicco. He is a board certified internist, gastroenterologist and addictionologist, licensed to practice medicine in the State of California. He received my medical degree from State University of New York Downstate Medical Center, Brooklyn, New York, in 1972. He is employed as a medical director at the AGMG Medical Group and also the director of the AGMG Liver Institute. He has been practicing medicine for 39 years in Orange County, California.

Dr. DeMicco opines that the Drs. Kundu and Singh did not meet the standard of care on the grounds that Dr. Singh, a student and not Dr. Kundu performed the ERCP. He opines that the chance of perforation is much higher when the procedure is performed by someone without experience. He also opines that Dr. Kundu breached the standard of care because he did not obtain the Plaintiff's informed consent to have Dr. Singh perform the procedure. He further opines that the chance of perforation was much greater when the ERCP was attempted with a precut followed by wire manipulation. See Declaration of DeMicco at ¶¶ 8-11. Therefore, the motion will be denied. The Plaintiff has met his burden of proof pursuant to CCP § 437c(p)(2). A triable issue of material fact exists as to whether the standard of care was breached by Drs. Kundu and Singh and whether that breach caused the Plaintiff's injuries.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 5/16/16 .
(Judge's initials) (Date)